

Louisiana Law Review

Volume 42 | Number 2

Developments in the Law, 1980-1981: A Symposium

Winter 1982

Public Law: Worker's Compensation

Alston Johnson

Repository Citation

Alston Johnson, *Public Law: Worker's Compensation*, 42 La. L. Rev. (1982)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol42/iss2/22>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

WORKERS' COMPENSATION

Alston Johnson*

Developments in workers' compensation during the past year have centered on interpretations of the new disability standards and delineation of the "intentional act" exception in the Act permitting an injured worker to proceed in tort. Only one piece of legislation of any consequence affected the Compensation Act. Act 827 provides specifically that householders are not liable in compensation to their employees whom they engage for labor other than in a trade, business or occupation.¹ Though non-coverage for domestic employees was probably clear under the language of the Act prior to amendment, Act 827 is indubitably an effort to overrule legislatively the implication from *Morgan v. Equitable General Life Insurance Co.*² that a domestic employee could seek compensation against the householder who employed him or her.

DISABILITY STANDARDS: THE ODD-LOT DOCTRINE

Just before publication of last year's symposium article, the supreme court adopted the odd-lot doctrine as the method of interpreting the new disability standards under the Act. No occasion was then presented for extended comment on the subject.³ Passage of a year permits the formulation of a very rough outline of what the Louisiana doctrine might be, though obviously considerable judicial interpretation remains to be done.

* Professor of Law, Louisiana State University

1. 1981 La. Acts, No. 827 adds sub-section B to LA. R.S. 23:1032 (1950), to read as follows:

There is exempt from coverage under this Chapter all labor, work, or services performed by any employee of a private residential householder in connection with the private residential premises of such householder and which labor, work, or services are not incidental to and do not arise out of any trade, business, or occupation of such householder [A]ny person who is engaged in the trade, business, or occupation of furnishing labor, work, or services to private residential premises shall be liable under the provisions of this Chapter to his employees or their dependents for injury or death arising from and incidental to their employment in rendering such labor, work, or services.

2. 383 So. 2d 1067 (La. App. 3d Cir. 1980). See Johnson, *Developments in the Law, 1979-1980 - Workers' Compensation*, 41 LA. L. REV. 557, 564-68 (1981).

3. See Johnson, *supra* note 2, at 557.

Initial Judicial Reaction

The initial judicial reaction to the new standards for determining disability was to choose the path of least resistance. The pre-1975 working-in-pain cases were handy and easy to deal with, and to these cases the courts first turned to resolve disability claims.

Under the standards prior to 1975, a finding that the worker could return to his former job only by working in substantial pain was equivalent to a finding that the worker was unable to return to his former job at all, and thus was a basis for an award of benefits based on total and permanent disability. It was reasonable to predict that this jurisprudence would continue to be viable under the new standard,⁴ since nothing was said in the 1975 amendment about a worker who might continue his employment in substantial pain. However, caution was indicated in the application of the principle, since the substantial increase in benefits and the emphasis on partial disability in the 1975 amendments suggested that a more rigorous view of the working-in-pain claim should be taken.⁵

The first cases reported after the 1975 amendments tilled the familiar ground of working in pain, but ignored the suggestion of a more rigorous view of such claims. For the most part, the judicial reaction to the new standard was to treat it much as if it were the old standard, as modified by the earlier cases. Awards based upon total and permanent disability were affirmed on what were in some instances relatively weak showings of working in pain.⁶

When used in conjunction with the new standard, the allegation of working in pain becomes very subjective and amorphous indeed. The judiciary seemed to realize that it had chosen a tool for inter-

4. 1 W. MALONE & A. JOHNSON, *WORKERS' COMPENSATION LAW AND PRACTICE* § 277 in 13 *LOUISIANA CIVIL LAW TREATISE* (2d ed. 1980).

5. *Id.*

6. *Downs v. Rapides Gen. Hosp.*, 398 So. 2d 116 (La. App. 3d Cir. 1981) (plaintiff particularly credible in pain complaints); *Kraemer v. Louisiana Power & Light Co.*, 393 So. 2d 346 (La. App. 1st Cir. 1980); *Irby v. Edwards Rental & Fishing Tools, Inc.*, 380 So. 2d 711 (La. App. 4th Cir. 1980); *Richard v. Standard Fittings*, 379 So. 2d 33 (La. App. 3d Cir. 1979); *Schriner v. Riverside Companies, Inc.*, 378 So. 2d 1035 (La. App. 2d Cir. 1980), *cert. denied*, 380 So. 2d 1360 (La. 1980); *Lemoine v. Employers Cas. Co.*, 378 So. 2d 594 (La. App. 3d Cir. 1979); *Guidry v. Ford, Bacon & Davis Constr. Corp.*, 376 So. 2d 352 (La. App. 3d Cir. 1979) (partial disability); *Jones v. Arnold*, 371 So. 2d 1258 (La. App. 3d Cir. 1979); *Bonnette v. Travelers Ins. Co.*, 367 So. 2d 1261 (La. App. 3d Cir. 1979). A somewhat more rigorous view of the working-in-pain concept was taken in *Lanieux v. Iberville Services, Inc.*, 391 So. 2d 1282 (La. App. 1st Cir.), *cert. denied*, 394 So. 2d 1248 (La. 1980).

preting the new disability standard which was not sophisticated enough for the task. The supreme court, in *Whitaker v. Church's Fried Chicken, Inc.*,⁷ appeared to recognize that working in substantial pain, though an important factor, was only part of a larger picture: the ability to engage in a gainful occupation for wages in the current labor market. The *Whitaker* opinion, looking forward as it did to the adoption of the odd-lot doctrine, proved to be a necessary step in the evolution of the judiciary's reaction to the new disability standard.

Adoption of the Odd-Lot Doctrine

While the working-in-pain cases were being decided, other cases grouped together the factors which were the foundation of the odd-lot doctrine without specifically adopting it by name. In *Goodwin v. Stathes*,⁸ for example, the trial court had found the employee to be partially disabled and he appealed, seeking to be classified as totally disabled. The appellate court noted that the employee was a painter and sandblaster, the only work he had ever known; that he was illiterate, barely competent in basic mathematics; and that he could not read street signs or maps. Taking into account both his injury and his lack of education and job skills, and citing expert evidence of his employability, the court held that he was totally disabled because he "cannot compete in the labor market and cannot engage in any gainful occupation for wages."⁹

In the *Whitaker* opinion itself, mentioned above, the supreme court also noted the factors underlying the odd-lot doctrine in reaching a conclusion of total disability, even though the majority opinion did not mention the doctrine.¹⁰ Young Whitaker was, in fact, the classic odd-lot worker except for his age. He was sixteen years old at the time of his injury—severe burns to his legs while attempting to dispose of hot grease. Scar tissue and accompanying pain and discomfort resulted from the injury. His treating physician felt that he could only work in a controlled environment in an "indoor sedentary type of occupation." Exposure to heat and humidity would be particularly painful and disabling. But Whitaker finished only four grades of elementary school before entering special vocational education. He had worked as a janitor. But as the court noted, the skills required for indoor work would be beyond his "meager abilities." An

7. 387 So. 2d 1093 (La. 1980).

8. 381 So. 2d 1327 (La. App. 4th Cir. 1980).

9. *Id.* at 1331.

10. 387 So. 2d 1093 (La. 1980). Dennis, J., concurring, suggested that the case should have been decided under the odd-lot doctrine. *Id.* at 1097.

expert in job placement felt his job possibilities would be limited to the public sector, where such handicaps were more likely to be tolerated. In fact, the expert noted that Whitaker's present employment was at a local zoo. The court held that Whitaker was entitled to an award for total disability, noting his pain and describing his situation as follows: "he had held a succession of jobs and has not remained long with any one employer. Whitaker is a marginal employee, at best,"¹¹

The *Whitaker* opinion was itself followed in the lower appellate courts as the latest pronouncement on the subject.¹² Some appellate judges openly suggested adoption of the odd-lot doctrine.¹³ Finally, in an important trilogy of decisions, the supreme court firmly adopted the odd-lot doctrine as the guiding principle in determination of total and permanent disability.

The clearest of these is *Oster v. Wetzel Printing, Inc.*¹⁴ The claimant was a 61-year-old lady who had suffered an injury which required amputation of portions of two fingers of her right hand. She was a bookbinder by trade, and knew no other. She had no education past the first year of junior high school, and her employer did not retain her after her injury. Evidence indicated that two years of psychotherapy might restore her mental, and therefore employment, capabilities; but she was a poor risk for such therapy because of her age. The court also entertained some doubt about who might pay for such therapy. There was no evidence of her employability from the employer's side, and only a limited amount of medical evidence suggesting some employment capabilities. A commissioner had granted benefits on the basis of total and permanent disability, but the trial and appellate courts had concluded otherwise. The supreme court restored the total and permanent disability award, noting that the claimant's age, lack of education and the nature of her injury placed her in the odd-lot category, and that no evidence of employability in other fields had been adduced. As for the use of the odd-lot doctrine in future cases, the court stated:

Thus, for all the reasons stated above and because we consider the doctrine to be consistent with the underlying policy and purpose of our workers' compensation statute, and essential to its

11. *Id.* at 1096.

12. *Gaspard v. Aetna Ins. Co.*, 390 So. 2d 243 (La. App. 3d Cir. 1980).

13. *Rushing v. Insurance Co. of N. America*, 391 So. 2d 864, 869 (La. App. 3d Cir. 1980) (Stoker, J., concurring).

14. 390 So. 2d 1318 (La. 1980). See generally as to odd-lot workers, Johnson, *supra* note 2, and Johnson, *The Work of the Louisiana Appellate Courts for the 1977-1978 Term - Workmen's Compensation*, 39 LA. L. REV. 881, 883-93 (1979).

interpretation in accordance with the compensation principle, we conclude that the odd-lot doctrine should be employed as the guiding concept in determining permanent total disability.¹⁵

In *Turner v. American Mutual Insurance Co.*,¹⁶ the doctrine was used again, but resulted in a remand to afford the employer the opportunity to introduce evidence of other work available to the claimant in the job market. The claimant was a 20-year-old black male, mentally retarded, who had been injured in his work as a woodcutter. He suffered a crushed foot and could not drive or stand for long periods. An industrial psychologist and vocational rehabilitation expert suggested several things he might do in the job market which were of a sedentary nature. The supreme court found the evidence on that point vague, and remanded for further elucidation on the subject. The court noted that the claimant "lives in the small town of Simmesport," no doubt an indication that the court thought his job possibilities in the area of his residence might be limited.

Finally, in *Dusang v. Henry C. Beck Builders, Inc.*,¹⁷ the court seemed to use the doctrine but found the requirements for odd-lot status unsatisfied on the facts before the court. Thus the appropriate conclusion was partial rather than total disability. The claimant, a welder whose age was not given, was injured but had returned to work at the same job. He claimed to be working in substantial and appreciable pain, but the supreme court observed that it was less than in *Whitaker* and that the claimant was not the "marginal employee" in terms of education and industrial experience that *Whitaker* had been. Accordingly, he was not an "odd-lot" worker, and therefore had only established partial disability.

Numerous subsequent decisions have applied the doctrine, either to award total disability¹⁸ or to determine that the claimant

15. 390 So. 2d at 1324.

16. 390 So. 2d 1330 (La. 1980).

17. 389 So. 2d 367 (La. 1980).

18. *Taintor v. Standard Supply & Hardware Co., Inc.*, 398 So. 2d 1269 (La. App. 4th Cir. 1981) (back injury to 42-year-old warehouseman; high school graduate with some clerical skills; had only held one job, with federal government, since his injury and it was subject to abolition without notice because it was temporary work; some evidence of substantial pain); *Lee v. Pratt-Farnsworth Constr. Co., Inc.*, 397 So. 2d 2 (La. App. 4th Cir. 1981) (ankle injury to 33-year-old truck driver; thereafter held job with friendly employer who permitted him extended work periods; eighth-grade education, no industrial history except as truck driver; occupational therapist testified that employment opportunities were limited to "sheltered" jobs where employers would make concessions to accommodate his injury; employer offered no evidence of employability or jobs available); *Celestine v. Henry Indus., Inc.*, 394 So. 2d 1260 (La. App. 1st Cir. 1981) (50-year-old semi-literate diesel mechanic with seventh-grade education suffered serious leg injury when run over by cement truck; had worked in that

has not made out a prima facie case of odd-lot status and should be entitled at best to an award based on partial disability.¹⁹ In some instances, the doctrine required a remand of the case for taking further evidence on the point.²⁰

Parameters of the Doctrine, and Future Problems

It is too early to delineate completely the ultimate parameters of the odd-lot doctrine or to suggest how it might differ from similar doctrines in other states. But the decisions do support some initial suggestions about the future elaboration of the concept.

The odd-lot doctrine is not a panacea. It is not a magic wand which will instantly make the knotty problems of determination of the extent of disability disappear. Rather, it is a method of judicial analysis permitting the consideration of a number of factors to reach a conclusion about the ultimate role of an injured worker in the economy. No one factor should be conclusive, though clearly one or more may predominate in a given case. The factors considered in

field and no other for 30 years; permanent degenerative knee problems thereafter; occupational therapist tested claimant and testified that he might be able to undertake "small engine repairs, laundromat management, locksmith work" or possibly work at a self-service gasoline station; cross-examination revealed he might need retraining for some of these in some instances, modification to his home, and might require assistance in the bookkeeping end of the business); *Wilson v. Ebasco Services, Inc.*, 393 So. 2d 1248 (La. 1981) (back injury with complication of phlebitis; female high school graduate with vocational training as secretary, in her early 30s; strong evidence of substantial pain, and pre-existing condition combining with her disc problem; court held that working-in-pain concept is "merely an embodiment of the broader concept expressed in the odd-lot doctrine"; even though she was not the ordinary odd-lot candidate, her pain was the decisive factor; case could be re-opened if regular employment became available to her); *Graham v. Jones Bros. Co., Inc.*, 393 So. 2d 861 (La. App. 2d Cir. 1981) (older worker, thereafter employed only by friend; ability to work appeared to decrease steadily after his injury; entitled to benefits based on total and permanent disability, apparently on basis of odd-lot doctrine though the term was not used as such); *Southern Cotton Oil Co. v. Mitchell*, 392 So. 2d 695 (La. App. 3d Cir. 1980) (back injury to 47-year-old manual laborer with fourth grade education; some pain, employment only in family-owned business; combination of factors led to his classification in odd-lot category; insufficient evidence from employer's side to show regular work available in job market); *Lemoine v. Marksville Indus., Inc.*, 391 So. 2d 528 (La. App. 3d Cir. 1981) (back and shoulder injury to 47-year-old widow; tried several jobs but pain was a factor; said to be a close question, but odd-lot applied; re-opening suggested if situation changed).

19. *Allor v. Belden Corp.*, 393 So. 2d 1233 (La. 1981) (odd-lot treatment denied to 31-year-old male with back injury; only permanent partial disability since the medical evidence was supportive of other jobs, and he had other experience; high school graduate with varied work experience as heavy equipment and truck operator, bartender, service station manager and cook); *Calogero v. City of New Orleans*, 397 So. 2d 1252 (La. 1980).

20. *Lattin v. Hica Corp.*, 395 So. 2d 690 (La. 1981).

cases already decided need not be considered an exclusive listing. The utility of the doctrine is that it will permit a reasoned consideration of the totality of the employment picture, and it will lose that usefulness if it is frozen into some kind of formula. It is by nature designed to be applied in specific factual situations.

Having added this caveat, one may attempt a cautious description of the factors which could be important in determining whether a *prima facie* case for classification in the odd-lot category has been made out by an injured worker. Certainly one might want to consider in a given case some of the following factors:

- the extent of actual physical impairment, including complications from pre-existing conditions;²¹
- the degree of pain following the injury;²²
- age;²³
- industrial history;²⁴

21. *Weller v. Brown*, 398 So. 2d 551 (La. App. 1st Cir. 1979) (pre-existing condition complicated injury; award based on total and permanent disability); *Celestine v. Henry Indus., Inc.*, 394 So. 2d 1260 (La. App. 1st Cir. 1981) (physical impairment would make it difficult for claimant to travel very far to obtain employment); *Wilson v. Ebasco Services, Inc.*, 393 So. 2d 1248 (La. 1981) (complications from pre-existing phlebitis made injury totally disabling). See *Janness v. State Accident Ins. Fund*, 8 Ore. App. 95, 493 P.2d 73 (1972) (a claimant who possesses the mental capacity necessary to be retrained might not be physically able to withstand the rehabilitation program; claimant not likely to be able to sit longer than half an hour); *Dale Motels, Inc. v. Crittenden*, 50 Ala. App. 227, 278 So. 2d 370 (1973) (claimant tried rehabilitation programs, but could not complete them because of physical and mental problems).

22. This clearly has been an important factor, and is likely to remain so. *Taintor v. Standard Supply & Hardware Co.*, 398 So. 2d 1269 (La. App. 4th Cir. 1981); *Lee v. Pratt-Farnsworth Constr. Co., Inc.*, 397 So. 2d 2 (La. App. 4th Cir. 1981); *Wilson v. Ebasco Services, Inc.*, 393 So. 2d 1248 (La. 1981); *Lemoine v. Marksville Indus., Inc.*, 391 So. 2d 528 (La. App. 3d Cir. 1981).

23. Advanced age may suggest difficult re-entry into the job market. *Oster v. Wetzel Printing, Inc.*, 390 So. 2d 1318 (La. 1980); *Celestine v. Henry Indus., Inc.*, 394 So. 2d 1260 (La. App. 1st Cir. 1981). On the other hand, youth (and its handmaidens, enthusiasm and optimism) might heighten chances for re-employment. *Allor v. Belden Corp.*, 393 So. 2d 1233 (La. 1981). Again, neither age nor any other single factor need be conclusive. See *Whitaker v. Church's Fried Chicken, Inc.*, 387 So. 2d 1093 (La. 1980) (16-year-old entitled to odd-lot classification and to total and permanent disability benefits because of other factors); *Wilson v. Ebasco Services, Inc.*, 393 So. 2d 1248 (La. 1981) (worker in early 30's classified in odd-lot category because of other factors).

24. By this is meant simply the various types of jobs which an individual has already held in the marketplace, and thus to which he might return with a minimum of retraining or rehabilitation. When a worker knows only a single trade, this may point toward classification in the odd-lot category if other factors are supportive of that determination. *Lee v. Pratt-Farnsworth Constr. Co., Inc.*, 397 So. 2d 2 (no industrial history except as truck driver, and he could not return to that trade); *Celestine v. Henry Indus., Inc.*, 394 So. 2d 1260 (La. App. 1st Cir. 1981) (no industrial history except 30 years as diesel mechanic); *Oster v. Wetzel Printing, Inc.*, 390 So. 2d 1318 (La.

- education, or lack of it;²⁵
- mental capacity;²⁶
- place of residence;²⁷
- inability to obtain work;²⁸
- wages actually earned after the injury;²⁹

1980) (no industrial history other than bookbinding). On the other hand, a claimant with a varied work history may fail in his effort to be classed as an odd-lot worker. *Allor v. Belden Corp.*, 393 So. 2d 1233 (La. 1981) (worker had been a heavy equipment and truck operator, bartender, service station manager and cook).

25. This had been a critical factor in some cases. *Whitaker v. Church's Fried Chicken, Inc.*, 387 So. 2d 1093 (La. 1980) (fourth-grade education); *Southern Cotton Oil Co. v. Mitchell*, 392 So. 2d 695 (La. App. 3d Cir. 1980) (fourth-grade education); *Celestine v. Henry Indus., Inc.*, 394 So. 2d 1260 (La. App. 1st Cir. 1981) (seventh-grade education). If a claimant's education has extended to the high school level, his chances of retraining are better. *Allor v. Belden Corp.*, 393 So. 2d 1233 (La. 1981).

26. In some instances, retraining might actually be impossible due to limited mental capacity. *Turner v. American Mut. Ins. Co.*, 390 So. 2d 1330 (La. 1980) (evidence of mental retardation; case remanded), might be such a case. See *Morrison-Knudsen Constr. Co. v. Industrial Comm'n*, 18 Utah 2d 390, 424 P.2d 138 (1967); *Rooney v. Charles*, 262 Ark. 68, 560 S.W.2d 797 (1978).

27. As suggested in the main volume, there is no indication that the legislature intended that workers move their residence to seek employment. Thus the determination of job availability should be within an area of reasonable proximity to the claimant's residence. See *Turner v. American Mut. Ins. Co.*, 390 So. 2d 1330 (La. 1980) (worker lived in "small town of Simmesport" according to the court, perhaps suggesting that his employment possibilities were limited); *Celestine v. Henry Indus., Inc.*, 394 So. 2d 1260 (La. App. 1st Cir. 1981) (jobs more than three miles from residence might be difficult to hold because of physical problems in driving that far). See also *Millender v. City of Carrabelle*, 128 Fla. 334, 174 So. 2d 740 (1965) (claimant lived in a small fishing village on the Florida coast with "limited job opportunities").

28. It may be helpful in a close case for an employee to adduce evidence of his unsuccessful attempts to obtain work, or for an employer to adduce evidence that he has made no such attempts. See, e.g., *Taintor v. Standard Supply & Hardware Co.*, 398 So. 2d 1269 (La. App. 4th Cir. 1981) (claimant able to hold only one job after injury, and that was a temporary federal government job). See also *Stanley v. Master Masonry Constr., Inc.*, 287 So. 2d 67 (Fla. 1973) (claimant adduced testimony from treating physician, clinical psychologist and owner of a job placement agency; latter testified that he had made 65 different contacts on the claimant's behalf with no success); *Johnson v. Brasington Cadillac-Oldsmobile, Inc.*, 265 So. 2d 8 (Fla. 1972) (two witnesses testified they denied the claimant a job; he testified as to nine other unsuccessful applications); *Gibson v. Minute Maid Corp.*, 251 So. 2d 260 (Fla. 1971) (evidence of job applications and denials assisted plaintiff's cause); *Clark v. Western Knapp Eng'r Co.*, 190 So. 2d 334 (Fla. 1966) (claimant unsuccessful, in part because he had weak medical evidence and did not show efforts to obtain employment). In fact, Florida appears to have established a rule that a finding of disability must be accompanied by proof of a bona fide work search, at least in close cases (perhaps those in which we might say the claimant had failed to establish a *prima facie* case for classification in the odd-lot category). See *Brevard Bd. of County Comm'rs v. Caldwell*, 397 So. 2d 1031 (Fla. App. 1980).

29. This may be a simple measure of post-injury employability, since it is the most direct way of determining what employers in the marketplace think of the claimant's

- future ability to compete in the open labor market;³⁰
- claimant's continued employment in the same job, either with the assistance of a friendly employer, or without;³¹ and
- other factors which are relevant to a determination of the complete picture of regular employment in the job market.³²

For their part, employers should be prepared with expert testimony of their own on the availability of steady employment for the injured worker. Some of the factors on the above list which appear to point toward *prima facie* classification in the odd-lot category may in fact indicate the contrary upon further reflection. An industry seeking mature, settled workers might see advanced age as an advantage, for example. The cases in which the employer has fared best under the doctrine are those in which evidence of employability was readily available, and the cases in which the employer has fared worst are those in which no such evidence, or only limited evidence on the point, was offered. In light of the size of total and permanent disability benefits these days, it would probably be economically wise for the employer or insurer to do a little investigation to *find* some things that the claimant would be able to do. We would all benefit from that search.

condition. Employment at a virtually identical wage may scuttle the claimant's action before it gets under way. *Hollis v. Travelers Ins. Co.*, 368 So. 2d 154 (La. App. 3d Cir. 1978); *Dusang v. Henry C. Beck Builders, Inc.*, 389 So. 2d 367 (La. 1980). These facts can be deceptive, however. If the wage is paid by an accommodating employer, and is not actually a reflection of competition in the marketplace, this may not be a fair appraisal of the claimant's condition.

30. To a great extent, this determination is a product of consideration of many of the other factors. See *Goodwin v. Stathes*, 381 So. 2d 1327 (La. App. 4th Cir. 1980); *Taintor v. Standard Supply & Hardware Co.*, 398 So. 2d 1269 (La. App. 4th Cir. 1981); *Lemoine v. Marksville Indus., Inc.*, 391 So. 2d 528 (La. App. 3d Cir. 1981).

31. Temporary good fortune in obtaining a job, or employment with family or a friendly employer who makes concessions for the worker's condition, should not of itself defeat odd-lot classification. *Graham v. Jones Bros. Co., Inc.*, 393 So. 2d 861 (La. App. 2d Cir. 1981) (employed only by a friend after injury); *Southern Cotton Oil Co. v. Mitchell*, 392 So. 2d 695 (La. App. 3d Cir. 1980) (employment only in family-owned business). Return to work at several jobs, only to find that one's physical condition makes that impossible, is supportive of odd-lot classification. *Lemoine v. Marksville Indus., Inc.*, 391 So. 2d 528 (La. App. 3d Cir. 1981). But returning to similar employment without substantial complaint suggests, at best, only partial disability and not odd-lot status. *Dusang v. Henry C. Beck Builders, Inc.*, 389 So. 2d 367 (La. 1980). All of this may suggest workers are better off not returning to work. If so, the fault lies within the Act itself. Such cases should be treated as partial disability cases under a measurement of ability to work, not wages actually earned.

32. A given claimant might have language difficulties. *Germain v. Cool-Rite Corp.*, 70 N.J. 1, 355 A.2d 642 (1976) (Haitian native would encounter additional difficulties in competitive job market due to language barrier). Or an injury might have left the claimant with an obvious deformity or disfigurement which might deter employers.

An employer should not be required to single out a specific job opening for a claimant, down to handing him the job application partially filled out. It should be sufficient that the employer or insurer respond to the prima facie odd-lot case by demonstrating that even within the limiting factors discussed above, there are regular callings within the job market which are open to the injured worker. Some of these might be unusual (at-home assembly employment, for example), but some creativity and imagination will serve the employer's position well.

Some aspects of all these factors have been considered in Louisiana decisions to this point, and no doubt others will be as we become more familiar with experiences in other states.³³ The doctrine is not likely to be universally popular,³⁴ nor will it be without its rough spots in judicial development. But it offers the best present avenue for interpretation of the post-1975 disability standard.

Role of Working-in-Pain Cases

The adoption of the odd-lot doctrine, especially in working-in-pain cases, clarifies the role that these cases should play in the future. The fact that an individual can demonstrate subjective complaints of substantial pain, corroborated by medical evidence of some organic bases of these complaints, is a major step toward classification as an odd-lot worker. Such a fact suggests what has always been suggested: that the worker who finds himself in that predicament is likely to be among the last to be hired, and may prove to be an unsatisfactory worker in some occupations because he cannot carry his share of the load. This may as a practical matter close him out of some fields and direct him into others. And if no other fields are readily available to him, he may be entitled to an award of total and permanent disability. But if he is entitled to such an award, it will not be *solely* because he works in substantial pain. Rather, it will be because his working in pain, in combination with other factors of the odd-lot doctrine which may apply in his case, makes his steady employment in a recognized calling in the labor market either highly doubtful or non-existent.³⁵

33. See Note, *Odd Man In: Louisiana Adopts the Odd-Lot Doctrine—A Suggested Analysis*, 42 LA. L. REV. 821 (1982).

34. See Juge, *The Odd-Lot Doctrine*, 27 LOY. L. REV. 69 (1981).

35. See, for example, the following cases in which pain was a primary though not the sole reason why the odd-lot doctrine was used to find total and permanent disability. *Taintor v. Standard Supply & Hardware Co.*, 398 So. 2d 1269 (La. App. 4th Cir. 1981); *Lee v. Pratt-Farnsworth Constr. Co., Inc.*, 397 So. 2d 2 (La. App. 4th Cir. 1981); *Wilson v. Ebasco Services, Inc.*, 393 So. 2d 1248 (La. 1981); *Lemoine v. Marksville Indus., Inc.*, 391 So. 2d 528 (La. App. 3d Cir. 1981).

THE "INTENTIONAL ACT" EXCLUSION

Predictably, the "intentional act" loophole which the legislature left in 1976 as an escape route from the Act was quickly tested for size, shape and strength. Almost without exception, a narrow interpretation has been adopted. Such an interpretation is consistent not only with the policy of the Act, but also with the legislative history of the 1976 amendments.

At this writing some twenty cases have dealt with the problem of the meaning of the closing paragraph which the legislature added to section 1032 in 1976:

Nothing in this Chapter shall affect the liability of the employer . . . to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

Most of the cases presented facts which could have constituted "gross negligence" (whatever that means) rather than "intentional" acts in the traditional definition. One of these cases reached the supreme court, and although it was a weak case on the facts, it appears to be one in which the court committed itself to a properly narrow reading of the exception.³⁶

One should consider before turning to these decisions the legislative history of the "intentional act" exception. The exception was a part of Act 147 of 1976, which began as House Bill No. 354. As originally introduced, the bill contained an exception from the exclusive coverage of the Act for the liability of the employer resulting from "an intentional or deliberate act." In that form, one could certainly have argued that the exception was broader than the final legislative enactment ("an intentional act"), unless the words intentional and deliberate are synonymous.

A House committee proposed, and the House adopted, an amendment to the exception broadening the exclusive nature of the compensation remedy to other members of the "employment family" (officers, directors, principals, and so on).³⁷ During House floor debate on the bill, two amendments were offered and rejected which would

36. *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981) (basically an ordinary negligence case in which the court of appeal had characterized the conduct as "intentional"; the court held that the meaning of intent was that "the defendant either desired to bring about the physical results of his act or believed that they were substantially certain to follow from what he did").

37. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE HOUSE OF THE STATE OF LOUISIANA, 2d Reg. Sess. at 11 (June 3, 1976).

have expanded the exception to instances of "gross negligence" as well as to "intentional acts."³⁸

On the Senate side, the words "or deliberate" were removed from the bill without objection in a floor amendment.³⁹ During that same debate, two amendments virtually identical to the two offered in the House were rejected.⁴⁰ As finally passed, the bill referred only to "intentional" acts of the employer and others, not to "gross negligence" nor even to "deliberate" acts.

The only reasonable conclusion to be drawn from the legislative process is that both houses of the legislature rejected attempts to make the exception any broader than "intentional" acts of the employer, thereby giving the exception a narrow scope.

This conclusion is perfectly compatible with what must have been the policy behind the 1976 amendments. The "executive officer" suits had become a major loophole in the Act, and there can be no doubt that the legislature was acting to close that loophole. But the legislature was understandably reluctant to sanction all conduct by the employer or a co-employee. One should not permit another employee to provoke a disagreement with the claimant, batter him, then hide behind the exclusivity provision of the Act. Thus the legislature provided that such a claimant is not limited to the Act, but may proceed against the intentional tortfeasor.

However, the policy which requires that an employer or employee not be able to use the Act as a shield to protect him against intentional acts which cause harm does not require that an

38. The first amendment would have provided an award of double the normal compensation against an employer (or others within that term) when the death, injury or disease "is caused by the employer's violation of a recognized safety rule or regulation, his failure to provide a safety device required by a recognized safety rule or regulation or by a statute, or by gross negligence on the part of a supervisory employee" *Id.* at 20. The second amendment would have provided that the exclusive coverage of the Act did not apply

if such injury or compensable sickness or disease is caused by the gross negligence, as hereinafter defined, of said party or parties. Gross negligence exists when there is such disregard of the interest of others that the tortfeasor's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances. Ordinary negligence sufficient to sustain a cause of action under Article 2315 of the Louisiana Civil Code is not sufficient to constitute gross negligence as defined in this Section.

Id. at 21 (June 4, 1976).

39. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE SENATE OF THE STATE OF LOUISIANA, 2d Reg. Sess. at 21 (June 4, 1976).

40. *Id.* at 42.

injured employee be entitled to proceed in tort against a co-employee or the employer when the conduct falls short of such intent. The fact that an employer or a co-employee may be headstrong, stubborn, grossly negligent, merely forgetful or callous is nothing other than one of the various degrees of "fault" in the work place.⁴¹ Indeed, the employee himself is protected against loss of compensation benefits for conduct beyond mere negligence. Section 1081 of the Act, as interpreted, requires nothing short of actual intent to inflict injury on himself or others in order to establish a defense to a compensation claim. "Gross negligence" as paraphrased in section 1081 is insufficient as a defense to a compensation suit.

The policy expressed in section 1032 as amended is that all non-intentional acts, of whatever degree of fault, belong within the Act if they are work-related.

The cases decided since 1976 have respected this policy decision by the legislature. Most of the factual situations can be described as ordinary negligence actions; or perhaps gross negligence actions, masquerading as intentional act cases. The appellate courts have adopted the traditional definition of intent as either the active desire of the consequences of one's action or knowledge to a substantial certainty that the consequences will follow the act. Some early cases stated the definition in the conjunctive, but the supreme court has recently stated it correctly in the alternative.⁴² The traditional definition is simply a way of relieving the claimant of the difficulty of trying to establish subjective state of mind (desiring the consequences) if he can show *substantial certainty* that the consequences will follow the act. The latter takes the case out of the realm of possibility or risk (which are negligence terms), and expresses the concept that an actor with such a certainty cannot be believed if he denies that he knew the consequences would follow. In human experience, we know that specific consequences are substantially certain to follow some acts. If the actor throws a bomb into an office occupied by two persons, but swears that he only "intended" to hurt one of them, we must conclude that he is nonetheless guilty

41. Professor Larson goes so far as to characterize the narrowness of the exception as follows:

Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employer's standpoint, the common-law liability of the employer cannot be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute or other misconduct of the employer short of genuine intentional injury.

2A LARSON'S WORKMEN'S COMPENSATION § 68.13 (1976).

42. *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981).

of an intentional tort as to the other, since he knows to a virtual certainty that harmful consequences will follow his conduct, regardless of his subjective desire.

The Louisiana cases thus far are at best "gross negligence" cases or perhaps even "deliberate" cases in which the conduct falls far short of knowledge to a substantial certainty of harmful consequences, and the claimants were properly restricted to their compensation remedy.⁴³ The only exception is an unusual case in which,

43. *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981) (sanitation employee sought recovery against co-employee who was driving sanitation vehicle); *Woolridge v. Mouledoux*, 398 So. 2d 1272 (La. App. 4th Cir. 1981) (employee in laundry facility fell due to accumulation of liquid on floor; alleged various failures on part of co-employees, including failure to provide safe place to work, to repair, and so on; exception of no cause of action sustained and affirmed); *McDonald v. Boh Bros. Constr. Co.*, 397 So. 2d 846 (La. App. 4th Cir. 1981) (employee injured after his foot caught in slack cable on crane boom from which he was descending in response to specific orders; exception of no cause of action sustained and affirmed); *Nugent v. Executive Officers of Harter Oil*, 396 So. 2d 537 (La. App. 3d Cir. 1981) (drilling rig employee injured in fall from scaffolding; alleged that officers "intentionally provided" an unsafe work area and "entertained a desire" to bring about his injury; dismissed as "mere conclusions of the pleader"; exception of no cause of action sustained and affirmed); *McAdams v. Black & Decker Mfg. Co., Inc.*, 395 So. 2d 411 (La. App. 3d Cir. 1981) (employee injured when his hand came into contact with blades of router; alleged that defendants removed guards on machine and ordered him to work there, and that this was so "grossly negligent" that it must be considered intentional; exception of no cause of action sustained and affirmed); *Crenshaw v. Service Painting Co.*, 394 So. 2d 706 (La. App. 3d Cir. 1981) (employee's dependents argued that his fall from scaffolding was caused by accumulation of sand from nearby operations, that he did not want to work under those conditions and complained to supervisor about them; summary judgment for defendant granted and affirmed); *Klohn v. Louisiana Power & Light Co.*, 394 So. 2d 636 (La. App. 1st Cir. 1981) (mechanic's helper in repair of diesel engine fell through open grate, alleged failure to provide safe place to work; summary judgment for defendant granted and affirmed); *Wilson v. Werner Co., Inc.*, 393 So. 2d 779 (La. App. 2d Cir. 1981) (iron worker fell from third floor of building under construction; "bare allegations" that employer or principal "wantonly disregarded applicable safety regulations" insufficient to bring case under intentional act exception; exception of no cause of action sustained and affirmed); *Citizen v. Theodore Daigle & Bro.*, 392 So. 2d 741 (La. App. 3d Cir. 1980) (employee in gun shop injured when another employee jokingly pointed gun, in for repair, at him, pulled the trigger, and it discharged; shooting employee did not know that pellet might be lodged in weapon; knew only that it would not fire when he had tried it earlier; court held that employee intended his act, but had no desire to inflict injurious consequences, nor was he substantially certain that they would follow; remedy limited to compensation by trial court, affirmed on appeal); *Waldrop v. Vistron Corp.*, 391 So. 2d 1274 (La. App. 1st Cir. 1980) (claimant alleged employer had "intentionally, knowingly and with willful, wanton and reckless disregard of plaintiff's safety" caused his occupational disease; court affirmed the sustaining of an exception of no cause of action, holding in a particularly forceful opinion that the alleged conduct did not rise to the level of an intentional tort); *Thornhill v. Black, Sivals & Bryson, Inc.*, 391 So. 2d 1256 (La. App. 1st Cir. 1980) (young worker

in fact, the claimant might have been able to state a cause of action for intentional infliction of mental distress; the court held that summary judgment under the circumstances was inappropriate."

INTERESTING "COURSE OF EMPLOYMENT" DECISIONS

As is usually the case, a number of interesting "course of employment" decisions were rendered. While none of the decisions

suffered amputation of left leg after getting it caught in auger rotating in trough below grain bin he was cleaning; summary judgment for defendant granted and affirmed; *Erwin v. Excello Corp.*, 387 So. 2d 1288 (La. App. 1st Cir. 1980) (claimant injured hand when it was caught in "Pure Pak" machine making milk cartons; alleged "intentional" failure to repair machine after notice of problems, to use safety devices, incorrect training; judgment rejecting tort claim affirmed); *Johnson v. Chicago Mill & Lumber Co.*, 385 So. 2d 878 (La. App. 2d Cir. 1980) (employee died when pile of firewood collapsed on him as he was attempting to load some of it on conveyor belt to boiler at sawmill; alleged "intentional" piling of wood in unsafe manner, amending earlier allegation of "willfully and knowingly" doing the same thing; summary judgment in defendant's favor affirmed); *Courtney v. BASF Wyandotte Corp.*, 385 So. 2d 391 (La. App. 1st Cir. 1980) (meter reading employee apparently fell through grate and onto charged cell and was electrocuted; dependents alleged that conduct was of such a nature that it was "willful and as such should be classified as intentional"; exception of no cause of action sustained in trial court and affirmed); *McGuire v. Honeycutt*, 387 So. 2d 674 (La. App. 3d Cir. 1980) (employee injured in automobile accident in course of employment; co-employee was at wheel of ambulance-type vehicle; alleged "intentional" running of red light after seeing no traffic at intersection; verdict in plaintiff's favor reversed on appeal); *Bourgoyne v. City of Baton Rouge*, 380 So. 2d 131 (La. App. 1st Cir. 1979) (motorcycle policeman died after traffic accident during chase of speeding motorist; failure of police department to provide his motorcycle with siren, arguably required by statute, not "intentional" so as to permit tort action); *Frazier v. Carl E. Woodward, Inc.*, 378 So. 2d 209 (La. App. 4th Cir. 1979) (steel worker fell from perch and alleged, as to executive officers, "such wantonness and gross negligence amounts to intentional assault," but court held facts did not support conclusion of intentional act); *Johnson v. Narcisse*, 373 So. 2d 207 (La. App. 4th Cir. 1979) (shipyard worker injured eye during assignment to paint in hold of vessel, arguably in darkened area; alleged "gross negligence and intentional act" of supervisor in assigning him to dark area; exception of no cause of action sustained by trial court and affirmed); *Tobin v. Jacobson*, 369 So. 2d 1161 (La. App. 1st Cir. 1979) (welder fell to death through unbarricaded opening; various allegations of disregard of safety procedures, but court held claimant had to allege desire of consequences or knowledge to substantial certainty; given opportunity to amend to attempt to state cause of action); *Guidry v. Aetna Cas. & Sur. Co.*, 359 So. 2d 637 (La. App. 1st Cir. 1978) (young employee lost sight in eye when knife placed outwards on shelf by co-employee came into contact with eye; alleged this was "deliberate" but court held desire of consequences or knowledge to substantial certainty had not been shown).

44. *Maggio v. St. Francis Medical Center*, 391 So. 2d 948 (La. App. 2d Cir. 1980) (claimant, who had suffered an emotional breakdown, proceeded in tort against his employer on theory that his immediate supervisor had engaged in a continuing course of conduct of "harassment, interference, intimidation, unfounded accusations, unreasonable acts," demoting claimant and generally making his life miserable; court held that allegations might state a cause of action for intentional infliction of mental distress and that on facts presented, summary judgment was inappropriate).

breaks new ground, the facts of several of them are intriguing.

Traveling Employees

The opinions in *Vickers v. Continental Southern Lines*⁴⁵ and *Blakeway v. Lefebure Corp.*⁴⁶ continue the broad coverage given to those employees whose jobs call for extensive traveling. The survivors of the deceased employee in *Vickers* were held entitled to benefits as a result of his death while "traveling." The decedent was an interstate bus driver, whose usual assignment was the run from Alexandria to New Orleans, arriving in the late afternoon, and a return run to Alexandria the next morning. Company policy and government regulations required such drivers to get eight hours of rest before making the return trip. In order to encourage compliance with this policy, the company provided free overnight accommodations for the operators in a motel about six blocks from the terminal. The decedent was on his way to the motel from the terminal when he was struck and killed by a passing motorist.

In *Blakeway*, an employer sent an employee to a two-week seminar out of state. Though classes were only Monday to Friday, the distances involved made it prohibitive for the employee to return on the intervening weekend. His meals and lodging for the weekend were paid, but he was otherwise on his own after the last class on Friday until Monday morning. Just before dawn on Sunday, after an evening of dining and drinking, the employee was injured when he dived into the shallow end of the motel swimming pool. Compensation was granted. The claimant had two arguments strongly in his favor. First, the "rest period" in which he found himself was imposed by the dictates of his employer's method of training, and was sanctioned by the employer's expenditure of funds for the weekend stay. Second, he benefitted from the liberal treatment usually accorded to traveling employees.

Recreational Activities

The decision in *Jackson v. American Insurance Co.*⁴⁷ is the first case actually involving an employer-sponsored recreational activity.⁴⁸

45. 383 So. 2d 80 (La. App. 3d Cir. 1980).

46. 393 So. 2d 928 (La. App. 4th Cir.), cert. denied, 399 So. 2d 610 (La. 1981) (Marcus, Blanche, and Lemmon, JJ., dissenting from the writ denial).

47. 391 So. 2d 1339 (La. App. 2d Cir. 1981) (Marvin, J., dissenting from refusal to grant a rehearing).

48. Two previous Louisiana cases involved activities which were more social than recreational, and compensation was denied in each instance. *Broussard v. Farm Storage & Equip., Inc.*, 236 So. 2d 882 (La. App. 3d Cir. 1970) (employee attending Christmas party was asked by employer to fetch some ice; injured while on apparently

A consortium composed of ten parishes employed youths at summer jobs, utilizing federal funds. The employment was limited to a nine-week period. On the last day of the employment term, the immediate supervisor of the workers took them in an employment vehicle from their last work place to a store and then to a pond outside the city limits for a swimming party to celebrate the end of the employment period. One of the young workers drowned during the party.

The trial court held that the death was in the course of and arose out of the employment, but concluded that the surviving parents had failed to show economic dependency. Thus the award was limited to funeral benefits. Both sides appealed, and the appellate court held that the death was not in the course of nor did it arise out of the employment. The court thus reversed even the award of funeral benefits.

The appellate court emphasized that attendance at the party was optional, even though it was held during the work hours and the participants were transported there by the employer. Previous wage arrangements made it clear that the workers would be paid for a full day whether they attended the party or not. Under the circumstances, the court felt that the "work was over" when the swimming expedition started.

There was no dissent from the original opinion, but Judge Marvin dissented from the refusal to grant a rehearing. His opinion suggested that too little attention had been given to the interdependence of the two factors of arising out of employment and in the course of employment. The claimants had a strong "in-the-course-of" argument. The workers were minors, and their adherence to their supervisor's instructions had previously been an issue (resolved in the supervisor's favor). They were transported to the activity in an employment vehicle, and would be returned by the same means at the end of the day. They thus could benefit from the treatment given the employee in *Matthews v. Milwhite Mud Sales Co.*,⁴⁹ who had been transported to a work site by his employer and would be returned by the same method. He was, according to one version, fired at the work site but continued to work until injured. The court

personal mission within the warehouse; compensation denied); *Courville v. National Food Stores of La., Inc.*, 174 So. 2d 251 (La. App. 3d Cir. 1965) (no compensation for death of meat market manager returning home from party given for defendant's outgoing district supervisor but not promoted or financed by defendant, and at which no company business was transacted).

49. 225 So. 2d 391 (La. App. 3d Cir. 1969), cert. denied, 255 La. 149, 229 So. 2d 732 (1970).

held that since the employee had no means of transportation from the work site back to the office, his employment would include the return transportation. Compensation was awarded.

The employee in *Matthews* had a strong showing of "arising-out-of" which the decedent in *Jackson* lacked. Still, the peculiar nature of the employment program and the focus on the supervisor's authority in *Jackson* probably should have been given greater importance in the determination of compensability than was evidenced in the original opinion. Perhaps the court was simply reacting to the fact that the employment itself was a result of a federal program, but compensation liability if it existed would be a local responsibility. Even so, a troublesome precedent narrowing the course of employment in employer-sponsored recreational activities will still have to be reckoned with in the future.

Lunch Hour

The opinions in *Wilson v. Evans Cooperage Co., Inc.*⁵⁰ and *Campbell v. Baker, Culpepper & Brunson*⁵¹ continue the distinction ordinarily made between lunch-hour injuries to those employees who are paid for the time spent eating lunch, and those who are not. The claimant in *Wilson* was an hourly-wage employee whose duties were not specified but were obviously not of an executive nature. He had left the premises during his lunch hour, punched out on the time clock as he was required to do, and was injured when he was struck by a vehicle while walking back to work. The evidence demonstrated that the claimant was free to leave the premises for lunch, and that he was not under the control or supervision of his employer during that hour nor was he paid for that time. The claimant's allegation that he had certain tasks to perform for his employer during the lunch hour (which might have made his "in-the-course-of" argument much stronger) was apparently not supported by the evidence.

The claimant in *Campbell* was a young associate in a law firm, returning from assigned duties out of town. She finished her business there shortly before noon and stopped at a fast-food establishment near the highway to pick up something to eat on the way back to her office. She was injured as she was leaving the parking lot of the establishment to return to the normal route to her office. She was held to be entitled to benefits. The court noted that the firm customarily reimbursed employees for mileage and meals during such assignments.

50. 387 So. 2d 72 (La. App. 4th Cir. 1980).

51. 382 So. 2d 1046 (La. App. 2d Cir. 1980).

These results are predictable and probably correct. One wonders, however, whether a measure of economic discrimination in the scheme has evolved to deal with these injuries. The claimant who is least able to bear the costs of an accident (the hourly-wage employee) is accorded the least expansive coverage for lunch-hour mishaps because he is ordinarily not compensated for his "lunch hour." The salaried employee, arguably better able to bear these costs, is paid in a lump sum and thus may argue that his "lunch hour" is compensated.

Fights

Recovery was denied to one of two employee combatants in *Augustine v. Washington Parish Police Jury*,⁵² but not because the court felt the fight did not arise out of or occur in the course of employment. Rather, the court held that the defendant had established the defense under section 1081 that the claimant's injury was caused by his "wilful intention to injure himself or to injure another. . . ."

The claimant was a road maintenance employee whose normal working hours were from 7:00 a.m. to 4:00 p.m. He was free to leave the work premises, however, whenever he returned there from field work, which might have been as early as 3:00 or 3:30 p.m. on some days. On the day in question, the claimant returned from the field a few minutes early but apparently waited around, either for the supervisor or for another employee. When the supervisor arrived, an argument and ultimately a pugilistic encounter ensued between the claimant and the supervisor. Previous bad blood between the two was indicated, and the argument was apparently over an accusation that the claimant might have damaged some equipment. As is almost always the case, the evidence was in conflict about the actual sequence of events during and just before the fight. The trial court had determined that the injury did not arise out of the employment because the claimant chose to remain on the premises after the end of the work day. The appellate court correctly noted that had the claimant simply slipped and hurt himself during his brief delay in leaving the premises after the end of the work day, no one could seriously have argued that he would not be entitled to compensation. Thus it was appropriate to conclude that his injury occurred in the course of his employment and arose out of his employment, according to the definitions those terms have received over the years in the cases. Recovery was another matter, of course, in light of the fact that a section 1081 defense was established by the defendant.

52. 383 So. 2d 1271 (La. App. 1st Cir.), cert. denied, 386 So. 2d 1379 (La. 1980).

Threshold Doctrine

The journey to and from employment is ordinarily not covered by the Act. An exception to the rule of non-coverage may be made out if the employee faces a distinctive travel risk in going to or coming from work and this risk exists in an area immediately adjacent to his place of work. The parameters of this exception vary from jurisdiction to jurisdiction, and they exist primarily for the purpose of keeping the exception within some reasonable administrative bounds.

A recent Louisiana decision illustrates the exception well, and properly suggests that the exception is not limited to railroad tracks, tunnels and other such highway risks which are usually associated with the exception.⁵³ In *Thomasee v. Liberty Mutual Insurance Co.*,⁵⁴ a municipal clerical employee had been working until 8:00 p.m. one winter evening in a building being used temporarily as a city hall. She had been requested, along with other employees, to park in a lot belonging to the local police jury in order to leave sufficient on-street parking for others who might visit city hall. The parking lot was actually the foundation of a razed high school, and was some 20 concrete steps above street level. The steps were uneven and broken, and no handrail had been provided. The claimant slipped on the steps in the dark and injured her wrist. The court properly held that the case fell within the threshold doctrine, and permitted recovery.

INTOXICATION AS A DEFENSE

For the first time in a long while, the defense of intoxication was successfully urged at the appellate level in two separate decisions. A sharply-divided supreme court (4 to 3) in *Parker v. Kroger's, Inc.*⁵⁵ denied the claim of a truck driver who had consumed "four to eight 10-ounce cans of beer" during a July 4th afternoon barbecue and then suffered serious injuries by running into a barricade on a trip that night to Houston. A blood test showed 0.104 percent by weight of alcohol, and a beer can was found in the cab of the truck. The court reasoned that even if the driver had fallen

53. Occasionally, the Supreme Court of Louisiana has indicated that the exception should be limited to such hazards. *Templet v. Intracoastal Truck Line, Inc.*, 255 La. 193, 230 So. 2d 74 (1969). Such an interpretation makes the exception too narrow; the important factor is the distinctiveness of the travel risk, which makes it possible for reasonable administrative boundaries to be drawn to separate that risk from those to which the employee is equally exposed along with the remainder of the population.

54. 385 So. 2d 1219 (La. App. 3d Cir. 1980).

55. 394 So. 2d 1178 (La. 1981) (Calogero, Dennis and Watson, JJ., dissenting).

asleep (as he alleged), his intoxication would have induced drowsiness, and therefore could be said to have caused the injury.

In *Renfroe v. City of New Orleans*,⁵⁶ the court resolved a disputable "arising out of and in the course of" problem in the claimant's favor, but then denied recovery on the ground that his intoxication was the cause of his injury. The claim was made by survivors for the death of a police officer who had been part of a special detail hired and paid by General Motors to protect certain executives. That assignment included driving automobiles furnished by General Motors to transport the executives. At the completion of the assignment in the afternoon, the officer was permitted to retain the vehicle until the next morning. That evening, the various participants in the special detail met for a night of dining and drinking to celebrate the successful completion of the assignment. Extensive testimony established that the officer in question was substantially intoxicated by the time he left for his home. He was killed when his car rolled off the interstate highway after striking the curb. A blood test revealed an alcohol level of 0.23 percent. The court noted that section 1081 does not require that an accident be caused "solely" by intoxication, but that if it should be so interpreted, this accident was caused solely by the officer's intoxication.

The opinion in *Renfroe* distinguishes the decision a few years ago in *Ray v. Superior Iron Works & Supply Co., Inc.*,⁵⁷ in which the appellate court had taken such a narrow view of the intoxication defense as virtually to eliminate it from the Act.⁵⁸

These two decisions appear proper on the facts presented, and may restore the defense of intoxication to its proper place in the Act. They should not be taken as a general re-introduction of employee fault into the compensation scheme, but rather as a demonstration that when intoxication is a substantial cause of the injury, the Act requires a denial of compensation. One can expect, of course, that the defense will continue to be subjected to rigorous judicial scrutiny, and may often be rejected.⁵⁹

56. 394 So. 2d 787 (La. App. 4th Cir.), *cert. denied*, 399 So. 2d 621 (La. 1981) (Dennis, J., dissenting from the writ denial).

57. 284 So. 2d 140 (La. App. 3d Cir.), *cert. denied*, 286 So. 2d 365 (La. 1973). The claimant had been drinking off and on for about ten hours before his vehicle failed to negotiate a curve and he was injured. A blood test revealed an alcohol content of 0.26%. The court held that the defendant's evidence failed to establish that intoxication was the cause of the claimant's injuries.

58. See 2 W. MALONE & A. JOHNSON, *WORKERS' COMPENSATION LAW AND PRACTICE* § 344 in 14 LOUISIANA CIVIL LAW TREATISE (2d ed. 1980).

59. See *Miller v. Lake Forest, Inc.*, 370 So. 2d 647 (La. App. 4th Cir.), *cert. denied*, 372 So. 2d 1046 (La. 1979) (air conditioning repairman equipped with "beeper" for after-

MISCELLANEOUS⁶⁰*Judicial Discussion of Settlement with Claimant*

A recent decision suggests that greater caution must be exercised in the compromise and settlement process. Section 1272 of the Act requires that any proposed compromise be presented to the district judge by a joint petition and that the judge "shall, in every case, discuss the settlement and its terms with the employee or his dependents." The claimant in *Smith v. Cajun Insulation, Inc.*⁶¹ filed an action to nullify a compromise and settlement on the ground that the trial judge had approved the compromise without discussing it with him. Both the trial court and the appellate court rejected the claimant's request, though on slightly different grounds.⁶²

The supreme court, however, reversed the lower courts and held that a petition alleging failure to discuss the compromise with the claimant stated a cause of action for nullity of the judgment. The court reasoned that the requirement of section 1272 was mandatory and failure to follow the requirement could be asserted by means of an action to nullify a final judgment under article 2004 of the Code of Civil Procedure.⁶³ This remedy is supplemental to that provided in the Act itself on the grounds of "fraud or misrepresentation."

hours service calls and permitted to take employer's van home spent several hours after work at restaurant; probably negligent in driving from restaurant to his home; an investigating officer smelled alcohol on employee's breath when he arrived at accident scene, but did not order blood test; defense of intoxication held not established; court noted that loss of control of the vehicle did not necessarily establish intoxication, since "many sober drivers lose control of their cars and run off the road." 370 So. 2d at 649.

60. Worthy of mention but not textual discussion are: *Travelers Ins. Co. v. Paramount Drilling Co.*, 395 So. 2d 849 (La. App. 2d Cir. 1981) ("direct" relationship of lending employer and borrowing employer will prevail and require sharing of compensation loss, over possible "indirect" relationship of principal and actual employer under section 1061 of the Act, which would call for indemnity of principal by actual employer); *Landry v. Benson & Gold Chevrolet*, 398 So. 2d 1262 (La. App. 4th Cir. 1981) (car salesman had use of demonstrator, and was returning home for some sales folders when cement truck backed into him; pursuit of offender took two-mile detour and 45-minute delay, and allegedly caused heart attack; court held salesman to be in course of employment but denied benefits due to lack of proof of causal connection between incident and disabling heart attack).

61. 392 So. 2d 398 (La. 1980) (Dixon and Dennis, JJ., dissenting).

62. *Smith v. Cajun Insulation, Inc.*, 383 So. 2d 451 (La. App. 4th Cir. 1980).

63. LA. CODE CIV. P. art. 2004 provides:

A final judgment obtained by fraud or ill practices may be annulled.

An action to annul a judgment on these grounds must be brought within one year of the discovery by the plaintiff in the nullity action of the fraud or ill practices.

Refusal to Furnish Proper Medical Treatment

The opinion in *Sam v. Standard Fittings Co.*⁶⁴ points up a problem in section 1314 which is likely to become more serious as time goes on. Amendments to the section in 1950 permitted the court to overrule the exception of prematurity if the claimant successfully showed that he had not been "furnished the proper medical attention."⁶⁵ The cases have to this point divided the issue of proper medical attention from the issue of actual payment of the medical bills.⁶⁶

The facts in *Sam* required the court to interpret the concept of furnishing proper medical attention. The claimant alleged that he was injured in late 1976, and had been paid weekly benefits. But he alleged that some \$40,000 in medical bills were unpaid at the time of filing the original petition in mid-1978. After the petition was filed but prior to trial, the employer paid the total medical expenses then due and sought the dismissal of the suit on an exception of prematurity.

The trial court overruled the exception, but a divided appellate court reversed. The appellate court noted that the employer had authorized medical services to be furnished to the claimant, and that such services had (with the exception of a one-day delay for obtaining approval) regularly been furnished by hospitals and doctors. In keeping with the decisions in earlier cases, the court held that proper medical attention had been furnished, even though a large amount of bills were unpaid.

One judge, concurring in the result, noted the hardships placed upon a claimant by such a result. A claimant who becomes concerned (as well he might be) over unpaid medical expenses for which he is probably primarily liable is put to the expense of a law suit in order to attempt to compel the employer or insurer to pay the expenses. The employer or insurer may delay paying the bills with impunity, responding only when sued; and may put an end to the suit by doing so. The suit is at the expense of the claimant, who is not entitled to penalties and attorney's fees for the delay, since his claim is dismissed as premature.⁶⁷ Moreover, in such an instance, is the employer "fur-

64. 389 So. 2d 729 (La. App. 3d Cir. 1980), *writ denied*, 396 So. 2d 1351 (La. 1981) (case settled).

65. 1950 La. Acts, No. 539.

66. See 2 W. MALONE & A. JOHNSON, *supra* note 58, at § 383.

67. *Sam v. Standard Fittings Co.*, 389 So. 2d 792 (La. App. 3d Cir. 1980); *Moore v. American Motorist Ins. Co.*, 216 So. 2d 674 (La. App. 3d Cir. 1968), *cert. denied*, 253 La. 629, 218 So. 2d 902 (1969).

nishing" the medical treatment as required by the statute, or are the hospitals and doctors "furnishing" the treatment?

A dissenting judge worried about prescriptive problems that the claimant might encounter. If Louisiana Revised Statutes 23:1209 is interpreted to provide a one-year prescriptive period on actions for payment of medical expenses,⁶⁸ and if Louisiana Revised Statutes 23:1314 is interpreted to forbid a claimant from seeking payment of medical expenses so long as he is being furnished proper medical attention, might he not be foreclosed from seeking payment of those expenses even though prescription is running against him? Suppose in *Sam* that the employer had not chosen to pay the medical bills prior to trial, but had insisted that proper medical attention was being furnished the claimant and his suit was premature? Other cases have indicated that a separate suit may be brought to compel payment of medical expenses, but that may be inconsistent with the provisions of section 1314. The claimant in *Sam* sought only payment of the medical expenses, but his suit was deemed "premature."

The supreme court granted a writ in *Sam*, but subsequently dissolved the writ upon representation by the parties that the matter had been settled.

There is of course no indication of what the legislature may have meant by the phrase "furnished the proper medical attention." Given that the claimant is probably going to be treated by the doctors and hospitals as primarily responsible for payment of the expenses, it would not be inappropriate for the legislature to amend section 1314 to permit, for example, the sustaining of an exception of prematurity only when proper medical attention had been furnished and outstanding expenses authorized by the employer or insurer have been paid within sixty days of their receipt.

Hernia

This troublesome area of the law continues to be so. The very short statutory period for being seen by a physician after the alleged injury has virtually been eliminated by the decision in *Freechou v. Thomas W. Hooley, Inc.*⁶⁹ The Act requires that the employee report the injury "promptly" and be "attended by a licensed physician within thirty days thereafter."⁷⁰ The claimant in *Freechou* reported

68. See 2 W. MALONE & A. JOHNSON, *supra* note 58, at § 384, especially text at n.20.

69. 383 So. 2d 337 (La. 1980).

70. LA. R.S. 23:1221(4)(q)(i) (Supp. 1975).

the incident promptly, but did not seek medical attention until three months later. Over the vigorous dissent of three justices, the majority of the supreme court held that the claimant need see a physician within thirty days of the incident only "if timely advised or instructed to do so by his employer."⁷¹ Though one may sympathize with the majority's compassion for the claimant, the language of the Act is clear on the point and should be enforced as written until amended by the legislature.⁷² Issues of prescription in hernia cases also occupied the judiciary during this term. Some confusion may result from the decision in *Lester v. Rebel Crane & Service Co.*⁷³ The claimant was injured on June 15, 1974 and required two surgical interventions. In September, 1974 an incisional hernia developed at the point of the original surgery and was repaired. The hernia reoccurred in February, 1975 and was repaired in March, 1975. Again the hernia appeared on March 10, 1976 and was repaired on March 3, 1977. And the hernia reappeared in January, 1978 and was corrected on March 30, 1978. Wages were paid in lieu of compensation periodically during these periods of hospitalization and disability, and the last such payment was on April 20, 1978. Suit was filed on February 28, 1979, and both lower courts ultimately determined the action to be prescribed.⁷⁴

The supreme court reversed, holding that the claimant's suit was not prescribed. The precise reasoning is elusive. At one point, the court stated that the prescriptive period of two years from the accident for "developing" injuries was inapplicable to the case, because the injury was immediately apparent. But at the end of the opinion, the court noted that the "payments of wages in lieu of compensation interrupted the two year prescriptive period. . . ."⁷⁵ For good measure, the court observed that the last wage payment in lieu of compensation was within one year of the suit, and that the claimant was "discouraged" from seeking benefits by the payment of wages in lieu of compensation.

In a footnote, the court offered an alternative ground for its holding. Since Louisiana Revised Statutes 23:1221(4)(q) provides

71. 383 So. 2d at 340-41.

72. See also *Carmouche v. Haynes Lumber Co., Inc.*, 378 So. 2d 466 (La. App. 3d Cir. 1979), cert. denied, 379 So. 2d 1114 (La. 1980), holding that it is sufficient that the claimant be attended by a physician within thirty days even though the presenting complaint is not hernia.

73. 393 So. 2d 674 (La. 1981) (Blanche, J., dissenting).

74. *Lester v. Rebel Crane & Serv. Co.*, 381 So. 2d 1318 (La. App. 4th Cir. 1980).

75. This statement seems incorrect. As noted by Justice Blanche in his dissenting opinion, payment of benefits interrupts the one-year period running from the accident, not the two-year period for "developing" injuries.

special rules for hernias, and treats each recurrence of a hernia following surgery as a separate hernia, a suit would be timely if filed within one year of the last recurrence. The last recurrence was in January, 1978, and the court opined that suit was filed "within one year" on February 28, 1979—which is in fact more than one year from the recurrence itself, though less than a year from the corrective surgery.

The supreme court's result may be correct, but the reasoning should be clarified. The court had properly held a few years earlier that the two-year period for "developing" injuries under section 1209 did not apply to inguinal hernia cases, since the legislature had made specific provision for such cases.⁷⁶ The case so holding involved a claimant who had three recurrences after the original hernia. He filed suit within one year of the last recurrence, but more than one year after the payment of the last compensation benefits and more than two years after the original accident. The court ultimately held that a suit filed within one year of the last recurrence was timely, since the hernia provisions term each recurrence after surgery "a separate hernia."

The only difference in *Lester* is that the suit was filed within one year of the last *payment* based on the last recurrence though it was filed more than one year from the recurrence and more than two years from the original injury. The court should simply have held that timeliness under either the one-year-from-accident rule or the one-year-from-last-payment rule will suffice, with the understanding that in hernia cases, each recurrence after corrective surgery is a new "accident."

One problem still exists with this rationale, and it is not insignificant. The hernia provisions refer to "inguinal" hernias, not incisional or other hernias. There is no difference in the recurrence problems, and therefore perhaps an extension to incisional hernias is justified in keeping with the policy of the section. Legislative correction is indicated.

Compensation for Deputy Sheriffs

The writer has elsewhere urged that the denial of compensation to deputy sheriffs on the grounds that they are "public officials" rather than "employees" is erroneous and should be changed.⁷⁷ Recently, the supreme court adhered to that suggestion, though not

76. *Owens v. Liberty Mut. Ins. Co.*, 307 So. 2d 313 (La. 1975).

77. 1 W. MALONE & A. JOHNSON, *supra* note 4, at § 98.

in a compensation case. In *Foster v. Hampton*,⁷⁸ the court resolved a difficult factual situation by holding that the state rather than an individual sheriff is the employer of a deputy sheriff. The issue was one of tort liability, not entitlement to compensation benefits. But the holding was thereafter applied in a compensation proceeding.⁷⁹ The court in that proceeding remanded the case to permit the joinder of the state as employer of the claimant deputy sheriff (in place of the sheriff), and suggested that a deputy might be jointly employed by two or more employers.⁸⁰

More recently, in *Phillips v. State ex rel. Department of Transportation*,⁸¹ an appellate court held squarely that the logical result of these cases, and the wiser policy, was that deputy sheriffs should be considered employees for the purposes of workers' compensation. The court thus reversed the decision of the trial court which had denied compensation to a deputy injured during a routine police call when his vehicle hit a large hole in a road supposedly maintained by the defendant state department.⁸² The court reasoned that if the deputy in *Foster v. Hampton* was an employee of the state for purposes of *respondeat superior*, then he should be an employee for purposes of the compensation statute. The fact that section 1034 of the Act specifically covers Orleans Parish deputy sheriffs without mentioning those of any other parish was explained by the court as being a situation in which the legislature was misled by the "public official" status which had been given to deputies in earlier cases. The decision in *Phillips* seems to be that the "public official" category was improper from the beginning, and that deputy sheriffs fall within the basic category of employees, thus making the Orleans Parish special coverage superfluous. The approach taken in the *Phillips* opinion is sound and should be followed.

78. 352 So. 2d 197 (La. 1977); 381 So. 2d 789 (La. 1980). For a full discussion of the *Foster* decision, see Comment, *Prescribing Solidarity: Contributing to the Indemnity Dilemma*, 41 LA. L. REV. 659 (1981).

79. *Rodrigue v. Breaux*, 388 So. 2d 60 (La. App. 1st Cir. 1980).

80. In doing so, the court conceded it also had been deceived by the turn of events in *Foster v. Hampton*. In *Michaelman v. Amiss*, 376 So. 2d 1029 (La. App. 1st Cir. 1979), between the first and second *Foster* decisions, the appellate court held that the state was not the employer of a deputy sheriff, asserting that the statement to the contrary in *Foster I* was dictum. But in *Michaelman v. Amiss*, 385 So. 2d 404 (La. App. 1st Cir. 1980), the court stated that it was convinced from *Foster II* that the supreme court "intends that a deputy sheriff be recognized as an employee of the State regardless of the factual situation."

81. 400 So. 2d 1091 (La. App. 1st Cir. 1981).

82. The court noted that the fact that the deputy was employed by one department or division of the state, and alleged injury at the hands of employees of another division, did not entitle him to proceed in tort, in the absence of a showing that these were truly separate "capacities" of the employer. See *Wright v. Moore*, 380 So. 2d 172 (La. App. 1st Cir. 1979), and discussion in *Johnson*, *supra* note 2, at 575-78.